INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument	5
Conclusion	13
Appendix A: Statutes involved	14
Appendix B: Equalisation agreement and joint military agreement	19
Appendix C: Extracts from letter of Secretary of War	21

CITATIONS

Cases:	
Chicago, Rock Island & Pacific Ry. Co. v. *United States*, 58 C. Cls. 33	8
Illinois Central Railroad v. *United States*, 62 C. Cls. 61, certiorari denied, 273 U. S. 710	8
Lake Superior & Mississippi R R. Co. v. *United States*, 93 U. S. 442	6
United States v. *Union Pacific Railroad Co.*, 249 U. S. 354	6, 7
Statutes:	
Act of July 25, 1866, c. 242, sec. 5, 14 Stat. 240, 241	14
Act of July 27, 1866, c. 278, sec. 11, 14 Stat. 297	14
Act of September 19, 1890, c. 907, sec. 15, 26 Stat. 426, 456	9–10
Act of March 1, 1893, c. 183, 27 Stat. 507	16
Act of March 15, 1898, c. 69, 30 Stat. 318, 321	10
Act of May 26, 1900, c. 586, 31 Stat. 205, 210	10
Act of June 6, 1900, c. 791, 31 Stat, 588, 631	17
Act of June 12, 1906, c. 3078, 34 Stat. 246, 247	10
Act of June 5, 1920, c. 240, 41 Stat. 948, 959–960	14
Act of June 30, 1921, c. 33, 42 Stat. 68, 79–80	16
Act of June 10, 1922, c 212, 42 Stat. 631	10
Act of June 30, 1922, c. 253, 42 Stat. 716, 729–730	16
Act of March 2, 1923, c. 178, 42 Stat. 1377, 1389–1390	16
Act of February 28, 1929, c. 366, 45 Stat. 1349, 1357	12
Miscellaneous:	
House Document 1491, 62d Congress, 3d session	11
4 Comptroller's Decisions 711	10
18 Comptroller's Decisions 168	10
22 Comptroller's Decisions 242	9
19 Opinions of the Attorney General 572	9

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 339

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 72–82) is not yet reported.

JURISDICTION

The Court of Claims entered judgment in favor of the petitioner on June 10, 1929. (R. 72.) On August 9, 1929, respondent filed a motion for a new trial and on November 4, 1929, the court entered an order allowing the motion and remanding the case to the general docket with leave to take further testimony. (R. 72, 73.) The final judgment of the Court of Claims was entered on June 1, 1931.

(R. 82.) The petition for a writ of certiorari was filed August 31, 1931 (R. 83), and a limited writ was granted on November 30, 1931. (R. 85.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The writ of certiorari granted by this Court was limited—

> to the question raised with respect to Engineer Officers of the War Department in performing duties in time of peace in connection with rivers and harbors improvements and the meetings of the California Débris Commission.

The question presented is whether such engineer officers are "troops of the United States" within the meaning of the laws giving the Government deductions from the regular transportation charges of land-grant railroads.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 14–16.

STATEMENT

The following is a summary of such of the facts found by the Court of Claims as are relevant to the questions now presented:

During the years 1920 to 1923 the petitioner transported over certain of its railroad lines officers of the Engineer Corps of the United States

Army, who were traveling in connection with improvement work on rivers and harbors or to attend meetings of the California Débris Commission. (R. 66, 70, 71.) The cost of such transportation was paid from appropriations of the War Department covering river and harbor works and the California Débris Commission. (R. 70.)

The statutes granting aid in the construction of the petitioner's railroad lines and statutes regulating the expenditure for Army transportation over land-grant railroads provide that such railroads shall transport troops of the United States at not exceeding fifty per cent of the rates paid by private parties for the same kind of service. (R. 65.).

At all times pertinent to this suit the petitioner was also a party to certain equalization agreements which provided that, with respect to such lines or portions of lines as were not subject to the land-grant deductions, the petitioner would accept for the transportation of persons for whom the Government was lawfully entitled to reduced fares over land-grant roads, the lowest net fare as derived through deductions on account of land-grant distance from the lawful fare or charge. (R. 65.) In other words, those agreements provided substantially for transportation at land-grant rates over nonland-grant roads. Extracts from a typical example of such an agreement are printed in Appendix B, pp. 19–20, *infra*.

The petitioner was also a party to certain agreements with the Quartermaster General of the Army, known as Joint Military Arrangements, whereby it agreed to certain deductions in addition to land-grant deductions for the transportation of officers and enlisted men of the United States Army, Navy, and Marine Corps where the cost of transportation was paid by the Government. (R. 65, 66.) Extracts from such agreements are printed in Appendix B, pp. 19–20, *infra*.

In settling the petitioner's accounts for transportation of engineer officers engaged in the duties above specified during the years 1920 to 1923, or in adjusting accounts of the petitioner previously settled, the disbursing or accounting officers of the Government made certain deductions from the regular commercial fare on the ground that the land-grant Acts, the Equalization Agreements, and the Joint Military Arrangements were applicable. The petitioner accepted payment at the reduced rates under protest (R. 66), and sued to recover the difference.

SUMMARY OF ARGUMENT

Officers and enlisted men of the Army traveling on official duty are "troops of the United States" within the meaning of the land-grant Acts regardless of whether they are traveling individually or as part of a moving army or body of soldiers. Land-grant rates are applicable to their transportation whenever their travel is in connection with their

official duties, regardless of whether those duties are strictly military in their nature. Engineer officers do not lose their military status when assigned to duties relating to public improvements. They continue to be a part of the troops of the United States, and are, therefore, entitled to transportation at the reduced rates provided by the land-grant Acts.

Even if it should be considered that officers and enlisted men of the Army are troops only when engaged in military activities, we submit that the improvement of rivers and harbors and the work of the California Débris Commission partake of a military character. The duty of supervising public improvements of this kind is assigned by Congress to the War Department and constitutes a major part of the duties of the Engineer Corps. It furnishes in peace time a means for developing and maintaining their efficiency which is essential in time of war. Moreover, the improvement of navigable waters is necessary to the national defense, since such waterways constitute important means for the transportation of troops and supplies.

ARGUMENT

The Acts granting aid in the construction of the petitioner's railroad lines (*infra*, p. 14) provided that the railroad should be a public highway for the use of the Government "free of all toll or other charges upon the transportation of the property or troops of the United States." Such Acts have

been construed as securing to the Government only the free use of the roadbed as a highway. *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442. The various Army appropriation Acts provide for payment for the service performed in transporting property and troops of the United States over land-grant roads at rates not to exceed fifty per cent of the rates charged private parties. See *United States* v. *Union Pacific Railroad Company*, 249 U. S. 354, 355, footnote 1, and Army appropriation Acts cited in Appendix A, *infra*, p. 14.

We submit that members of the military forces of the United Sates traveling on official business are "troops" within the meaning of the land-grant Acts, regardless of the precise nature of the duty to which they are assigned. The petitioner contends that engineer officers of the Army traveling in connection with the improvement of rivers and harbors and the work of the California Débris Commission are not "troops" within the meaning of these Acts.

In support of its contention the petitioner urges first, that since this Court said in the *Union Pacific* case, *supra*, p. 357, that the word "troops" means "soldiers collectively,—a body of soldiers," it follows that transportation of troops connotes the movement of soldiers collectively or in a body. This argument claims too much, for its logical result is that the land-grant roads would not be required to transport at reduced rates soldiers who

are traveling individually and apart from the units to which they are attached.

The *Union Pacific* case presented the question whether or not certain classes of persons were entitled to transportation at land-grant rates. The specific question to which the Court directed its attention in each instance was not whether these persons were traveling individually or in a body, but whether their status was that of soldiers when the transportation was furnished. It was held that this depended upon (1) whether they were members of the military forces of the United States, and (2) whether they were traveling in a public or a private capacity. Thus the Court recognized that the soldier on furlough is "a part of the Army or troops of the United States," but concluded that his transportation back to his station is not "transportation of troops" because he is traveling for his own purposes rather than for the purposes of the Government. At the conclusion of its opinion, this Court said (p. 360–361):

> We have no occasion to consider whether * * * a soldier travelling for the purposes of the Government, but not for any purpose connected with war or the preparation for war, falls within the provisions * * *.

Since the decision in the *Union Pacific* case the Court of Claims has held that the application of land-grant rates is not limited to soldiers traveling as part of a detachment or moving body of men.

Illinois Central Railroad v. *United States*, 62 C. Cls. 61, certiorari denied, 273 U. S. 710; *Chicago, Rock Island & Pacific Ry. Co.* v. *United States*, 58 C. Cls. 33. Moreover, in a number of cases the Court of Claims has sustained land-grant deductions without inquiring whether the persons concerned were traveling individually or as part of a moving army.

The petitioner concedes (Br. p. 61) that the land-grant roads have acquiesced in the application of the land-grant privilege to the transportation of individual officers and enlisted men provided that the travel is for strictly military purposes. We take the position that soldiers traveling on official duty are "troops," regardless of whether they are engaged in strictly military duties or in the performance of other duties authorized by law and assigned to the particular branch of the military establishment of which they are a component part.

Engineer officers do not cease to be members of the military forces or "troops" of the United States when they are assigned to duty in connection with the improvement of rivers and harbors or the work of the California Débris Commission. They remain under military discipline, and are subject to the orders of their superiors. The work upon which they are engaged is a part of their duty as members of that branch of the military establishment to which they are attached, and when traveling in connection with such duty, they are traveling for official purposes.

It appears to have been the uniform departmental practice to construe the land-grant Acts as applicable to transportation of officers and enlisted men of the Army when traveling on official business of any kind. Thus, it has been ruled that the Government is entitled to land-grant rates for the transportation of enlisted men, subpœnaed as witnesses before a United States District Court, even though the cost of transportation is paid out of an appropriation for the Department of Justice. 22 Comp. Dec. 242.

The precise question here involved was submitted to the Attorney General for an opinion in 1890, when the Michigan Central Railroad refused to grant free transportation to an officer of the Engineer Corps, engaged in rivers and harbors works, on the ground that he was not a part of the troops of the United States. The Attorney General ruled that any members of the Army traveling upon Government business must be transported at land-grant rates. 19 Ops. Atty. Gen. 572.

A similar question has arisen on several occasions in connection with the allowance to Army officers of traveling expenses. Engineer officers traveling in connection with work relating to public improvements are entitled to receive a mileage allowance as are other officers of the Army. An amendment to the Act creating the California Débris Commission (*infra*, p. 16) contains a specific provision with respect to the mileage allowance to which officers engaged in the work of that Commission are entitled. Section 15 of the Act

of September 19, 1890, c. 907, 26 Stat. 426, 456, provided that in determining the mileage to be allowed engineer officers, no deduction should be made for travel over land-grant railroads. This was an exception to the general rule providing that a certain sum per mile should be deducted from the mileage allowance of officers when traveling over land-grant or bond-aided railroads. The Comptroller of the Treasury held in 18 Comp. Dec. 168 that the Act of 1890 was repealed by later general Acts relating to mileage.[1]

If the deduction from mileage allowance is applicable to engineer officers traveling in connection with public improvements, when the travel is over land-grant roads, it must be for the reason that such officers are considered to be entitled to transportation at land-grant rates. The opinions of the Comptroller of the Treasury show that such a deduction has been made for many years. 4 Comp. Dec. 711; 18 Comp. Dec. 168.

Even if it be considered that officers and enlisted men are not troops unless they are traveling for military purposes, we submit that the activities of the Engineer Corps in connection with public improvements partake of a military character. The Court of Claims said in its opinion (R. 76):

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[1] See Act of March 15, 1898, c. 69, 30 Stat. 318, 321; Act of May 26, 1900, c. 586, 31 Stat. 205, 210; Act of June 12, 1906, c. 3078, 34 Stat. 246, 247; Act of June 10, 1922, c. 212, 42 Stat. 631.

> The transportation of troops in war time is of vital concern, and the very fact that Congress creates permanent commissions composed exclusively of engineer officers of the Army indicates a conception of the necessity of entrusting the supervision of the improvement of rivers and harbors to the military department of the Government. While it may be said that the primary purpose of the improvement of rivers and harbors has to do with interstate and foreign commerce, this fact does not exclude the additional vital interest of the Government in times of war, and unless it may be said that the officer's travel must be confined exclusively to military duty, the plaintiff's insistence seems to us untenable. The Panama Canal is not alone a commercial artery of inestimable value; its military significance is recognized.

It has long been the practice of Congress to delegate to the War Department powers relating to the improvement of navigable waters.[2] This practice doubtless arose by reason of the fact that for many years the Army was the only establishment of the Government which had a trained corps of engineers. Moreover, as the Court of Claims observed, the improvement of navigable waters bears a close relation to the national defense, and it is therefore highly appropriate that such work should be within the jurisdiction of the War Department.

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[2] A compilation of laws relating to rivers and harbors from August 11, 1790, to March 4, 1913, will be found in House Document 1491, 62d Cong., 3d Sess.

Petitioner relies strongly on the fact that in certain recent appropriation Acts, such as the Act of February 28, 1929, c. 366, 45 Stat. 1349, 1379, the work of the Corps of Engineers in connection with river and harbor improvements and the California Débris Commission is listed among the "Non-Military Activities of the War Department." We question whether this classification is of any particular significance in relation to the issue presented in the instant case. Thus it will be observed that the same appropriation Act (45 Stat. 1357) lists the transportation of recruits under the military activities of the War Department, but this Court held in the *Union Pacific* case that recruits are not troops and therefore not military persons.

It is well recognized that the peace-time activities of the Engineer Corps have a military purpose, in addition to that mentioned by the Court of Claims, in that they provide practical experience which would not otherwise be available. (See letter of the Secretary of War, Appendix C, *infra*, pp. 21–25.) In the absence of such an opportunity for practical training it would be impossible for Army engineers to maintain that high standard of efficiency which is essential in time of war.

In the foregoing discussion we have considered only the status of engineer officers engaged in duties relating to public improvements in connection with the rates to which the Government is entitled under

the land-grant Acts. The case also involves the applicability to such officers of the rates specified in certain land-grant equalization agreements and joint military arrangements to which the petitioner was a party.

The equalization agreements (*infra*, p. 19) in terms apply to persons for whom the United States is entitled to reduced fares over land-grant roads. The joint military arrangements (*infra*, p. 20) provide for additional deductions from the commercial rates in the case of certain specified classes of persons, including officers and enlisted men of the Army, Navy, and Marine Corps. These arrangements have been generally construed as applying to the same classes of persons to whom the land-grant rates would be applicable, and both the petitioner and the Court of Claims have so treated them.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
H. BRIAN HOLLAND,
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FEBRUARY, 1932.

APPENDIX A

STATUTES INVOLVED

Each of the Acts of Congress granting aid in the construction of the petitioner's railroads contained the following provisions:

> * * * And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States. (Sec. 5, Act of July 25, 1866, c. 242, 14 Stat. 240, 241.)
>
> That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation. (Sec. 11, Act of July 27, 1866, c. 278, 14 Stat. 297.)

The Army Appropriation Act of June 5, 1920, c. 240, 41 Stat. 948, 959–960, provides in part as follows:

> For transportation of the Army and its supplies, including transportation of the troops when moving either by land or water, and of their baggage, including the warrant officers of the Mine Planter Service, mem-

bers of the Officers' Reserve Corps, enlisted men of the Enlisted Reserve Corps, and retired enlisted men when ordered to active duty, including the cost of packing and crating; for transportation of recruits and recruiting parties, of applicants for enlistment between recruiting stations and recruiting depots; for travel allowance to officers and enlisted men on discharge; * * * for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts), but in no case shall more than 50 per centum of full amount of service be paid; * * * *Provided,* That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: *Provided further,* That in expending the money appropriated by this Act a railroad company which has not received aid in bonds of the United States and which obtained a grant of public land to aid in the construction of its railroad on conditions that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other Government services, and also subject to such regulations as Congress may impose restricting the charge for such Government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroads, shall be paid out of the moneys appropriated by the foregoing provisions only on the basis of such

> rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed 50 per centum of the compensation of such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service: *Provided further*, That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts: * * *.

The Act of June 30, 1921, c. 33, 42 Stat. 68, 79–80; the Act of June 30, 1922, c. 253, 42 Stat. 716, 729–730; and the Act of March 2, 1923, c. 178, 42 Stat. 1377, 1389–1390, contain similar provisions relating to appropriations for the transportation of the Army and its supplies.

The Act of March 1, 1893, c. 183, 27 Stat. 507, creating the California Débris Commission, provides in part as follows:

> * * * That a commission is hereby created, to be known as the California Débris Commission, consisting of three members. The President of the United States shall, by and with the advice and consent of the Senate, appoint the commission from officers of the Corps of Engineers, United States Army. Vacancies occurring therein

shall be filled in like manner. It shall have the authority, and exercise the powers hereinafter set forth, under the supervision of the Chief of Engineers and direction of the Secretary of War.

* * * * *

SEC. 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. * * *

SEC. 4. That it shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys already made and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from débris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished, without injury to the navigability of said rivers or the lands adjacent thereto.

* * * * *

The Act of June 6, 1900, c. 791, 31 Stat. 588, 631, reads in part as follows:.

* * * *Provided,* That so much of the Act of March third, eighteen hundred and ninety-nine, as provides that the members of the California Débris Commission shall receive only actual expenses in lieu of mileage while traveling on duty is hereby repealed, and hereafter the officers of the commission shall receive the mileage allowed by law.

APPENDIX B

EQUALIZATION AGREEMENT AND JOINT MILITARY ARRANGEMENTS

The Joint Military Equalization Agreement No. 1, effective January 1, 1921, to which petitioner was a party, and which is typical of the agreements entered into from time to time between the Government and various railroad companies, provided in part as follows:

> For transportation of persons for whom the United States is lawfully entitled to reduced fares or charges over land-grant roads, when movement is made under United States requests for transportation of the issue of the War Department, Navy Department or Marine Corps, the carriers whose names are signed hereto, hereby agree * * * to accept the lowest net fare or charge and the lowest net excess baggage rate lawfully available, as derived through deductions account land-grant distance, from the lawful fare or charge from point of origin to destination in effect via a route that is recognized as a usually traveled route for military traffic at time of movement.

The Interterritorial Military Arrangement, effective January 1, 1917, to which petitioner was a party, provided for a deduction of five per cent from the commercial fares, in addition to land-grant deductions for the transportation of—

> officers and enlisted men and others connected with the United States Army, United

> States Navy, and United States Marine Corps, for whom the United States Government is lawfully entitled thereto and when traveling on transportation requests of the issues of the United States Army, United States Navy, and the United States Marine Corps, and at United States Government expense only.

The Joint Military Arrangement No. 1, effective January 1, 1921, to which petitioner was a party, provided for a deduction of three per cent from the commercial fares in addition to land-grant deductions for transportation of—

> commissioned officers, warrant officers, field clerks, nurses, and enlisted men of the United States Army, and commissioned officers, warrant officers, and enlisted men of the United States Navy and United States Marine Corps for whom the Government is lawfully entitled thereto when traveling on transportation requests of the issues of the United States War Department, United States Navy Department, and United States Marine Corps, where the entire transportation cost is paid by the United States Army, United States Navy, or United States Marine Corps, as the case may be. * * *

APPENDIX C

EXTRACTS FROM LETTER OF THE SECRETARY OF WAR

The following are extracts from a letter addressed by the Secretary of War to a member of the House of Representatives with reference to a proposed bill providing for the transfer to the Department of the Interior of duties at present performed by the War Department. We have omitted for the sake of brevity such portions of the letter as have no relation to the question presented in the instant case.

Honorable WILLIAM WILLIAMSON,
HOUSE OF REPRESENTATIVES,
Washington, D. C.

DEAR MR. WILLIAMSON: In reply to your letter of January 13, 1928, asking for criticism or suggestion on H. R. 8127, 70th Congress, 1st Session, "A bill to provide for the transfer to the Department of the Interior of the public works functions of the Federal Government," I submit the following:

I am not in favor of the passage of such a bill because it is opposed to the best interests of the United States from the standpoint of administrative or technical efficiency, economy, and national defense. This bill aims to transfer the work of River and Harbor Improvement and other civil works from the War Department to the Department of the Interior. * * *

* * * * * *

* * * As a substitute for the existing arrangement, it is proposed in pending legislation that members of the Corps of Engineers be detailed for limited periods under the Department of the Interior on nonmilitary duties pertaining to the civil functions of the enlarged Department of the Interior. Such an arrangement would be unworkable. An idea persists that the requisite skill in the conduct of public works can be readily acquired, and that officers temporarily detailed under the above proposal to such duties could be placed in positions in which they would be usefully employed, with advantages to the work and to their professional education. Such is not the case. Responsibility for important and specialized work can not be entrusted to officers on temporary duty, over whom the chief of the service has no permanent control. Officers now are carefully selected for the positions they are to fill. It is hardly probable that the Department of Public Works would or could give any real responsibility to officers detailed temporarily; without such actual charge of the work, and the responsibility that goes with it, a temporary connection with the work or a mere tour of observation would be of minor value in the training and instruction of the officers. To the younger officers some value might accrue. In reality the older officers of the Corps of Engineers would soon be wholly separated from the execution of public works.

For the needs of National Defense we must have a Corps of Engineers in the army whether or not its duties include civil work. Military Engineers have demonstrated, over a period of one hundred years, that they are competent and qualified to handle river and

harbor work efficiently and economically. River and harbor projects require the national viewpoint which is developed automatically and deliberately by frequent transfer of officers from one part of the country to another. Their salaries are the same on civil work as on military work, and are much less than those of civil engineers in private life holding positions of similar responsibility. No set of men in public life can be found who are freer from political influence than the officers of the Corps of Engineers. To develop capacity for wartime leadership the officers of the Corps of Engineers must have peacetime experience requiring major decisions. The present arrangement assures a fair, economical, and efficient administration of its river and harbor work by a group of engineers with a developed national viewpoint. Moreover, the army to that extent is returning dividends to the nation and a portion of its personnel is getting valuable preparation for war duties not possible of duplication in any other way.

* * * * *

In view of the past history of this improvement it is believed that it would be difficult to prevent political considerations from governing the assignment of civilians to all such positions as district engineers or other important executive positions. It is impossible not to believe that the Corps of Engineers would soon be eliminated from such work. This appears to be the main object of the proposed legislation. This separation would not only be uneconomical but it would also have a serious effect upon the national defense. The problem of national defense is one which pertains particularly to

the War Department. The whole theory of our Defense Act is based on a small regular army and a large trained reserve.

During the last war, the role of the engineers was a very important one and called for engineering skill and experience of an extremely diversified kind. In future wars it will probably be even more important and far more complicated. In order that this country may have a properly balanced force for war, the army must have a competent and versatile Corps of Engineers to take up with the greatest promptness, the problems which, on the breaking out of war, will be presented to it, and to serve as the nucleus of the great military engineer organization which must later be built up. The only way in which a Corps of Engineers, capable of performing such varied service, can be maintained, is by providing the officers of the Corps with sufficient work in time of peace to give them practical experience with large engineering, construction and supply problems, and to enable them to acquire a broad acquaintance with the civil engineers of the country from whom the vastly enlarged war personnel must be drawn. Many of the officers of the Corps of Engineers in charge of civil works have done much toward fostering cooperation in national defense among the engineers of the country.

One of the advantages of the present system comes from the contacts and associations with the best engineers in the country, who form the pool from which the Corps of Engineers must be expanded in war time. In the solution of large problems of supply, organization, and construction which arose during the World War, the experience

which officers of the Crops of Engineers had gained on civil work was of great assistance. Furthermore, their acquaintanceship with the civil engineers of the country who volunteered so freely, resulted in a more efficient employment of those who entered the army.

* * * * *

DWIGHT F. DAVIS,
Secretary of War.

Mailed 2–11–28, 5 p. m.

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